MASON HAYES & CURRAN

DRAFT MERGER GUIDELINES

Response to Consultation

A. Introduction

1. Mason Hayes & Curran would like to thank the Competition Authority for the opportunity to comment on its Draft Merger Guidelines of 13 September 2013 (the "**Draft Guidelines**").

2. As one of the leading law firms in Ireland with a significant merger control practice, Mason Hayes & Curran has a particular interest in the way in which the Competition Authority reviews mergers notified to it under the Competition Act 2002 (the "**Act**") and its application of the substantial lessening of competition ("**SLC**") test.

3. Mason Hayes & Curran welcomes the Draft Guidelines and considers them to be well drafted and thorough. There are a number of areas, however, in relation to which we would welcome some additional clarification and/or guidance. This is particularly the case as the guidelines are expressed to be intended to be accessible to non-specialists as well as specialists.

4. For ease of reference, in sections **B** to **K** of this paper, we have organised our comments under the headings used by the Authority in the Draft Guidelines. Additional comments are included in sections to **L** to **M** of this paper.

B. SLC (paragraphs 1.4 - 1.11)

5. Paragraph 1.2 of the current guidelines indicates that the SLC test is interpreted in terms of consumer welfare. Assuming that the Authority is not proposing to move away from a consumer welfare test, there is no clear statement in the Draft Guidelines that the SLC test is to be interpreted in terms of consumer welfare. Paragraphs 1.7 and 1.9 are, in our view, not clear enough in this connection and this might be addressed.

6. The Draft Guidelines note that the Authority's analysis of a notified merger will take into account non-controlling minority shareholdings in relevant third parties that are held by any of the merging parties prior to the merger.

7. It is not clear from the Draft Guidelines what the Authority means by "relevant" third parties. It would be very helpful if the Authority could describe, or at least outline, the factors it will consider in determining what would constitute a "relevant" third party when analysing whether it is appropriate to take a non-controlling minority shareholding into account in the review of a notified merger?

C. Evidence (paragraph 1.23)

8. The Draft Guidelines note that the Authority has a number of information gathering powers at its disposal and, in particular, under section 31 of the Act, it can summons any of the merging parties and/or third parties to produce documents and answer questions under oath.

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9. We consider that the powers under section 31 of the Act should not be used in the ordinary course of the Authority's merger review. Indeed, it is our experience that the Authority does not invoke its powers under section 31 of the Act as standard procedure. As such, we consider that it would be useful, in particular for parties not familiar with the Irish merger control regime, if the Authority could give guidance on the circumstances in which the Authority would be likely to use its powers under section 31 of the Act to summons witnesses and question them under oath or require them to produce documents.

D. Market Definition (paragraph 2.6)

10. The Authority notes that its previous decisional practice relating to market definition may provide only limited guidance, as market definition depends on the specific facts, circumstances and evidence of the particular merger under investigation. As a matter of practice, however, parties will look to the relevant previous decisional practice of the Authority (and indeed other merger control authorities, such as the European Commission).

11. It would be helpful, therefore, if the Authority could acknowledge that this approach is appropriate in most circumstances, at least as a starting point and particularly, perhaps, in circumstances where the Authority has relatively recently opined on the relevant market and then caveat that by saying that market definition in any particular case will ultimately depend on the specific facts, circumstances and evidence of the particular merger under investigation.

12. It would also be helpful if the Authority could clarify whether and to what extent it considers as relevant the decisional practice of the European Commission and other merger control authorities.

E. Market Definition (paragraph 2.7)

13. The Draft Guidelines state that markets may be defined with respect to particular customers or groups of customers and their locations where sellers can engage in price discrimination. It would be helpful if the Authority could give additional guidance in respect of the circumstances where it would consider such an approach appropriate. See, for example, the Merger Assessment Guidelines of the Competition Commission and the Office of Fair Trading in the UK – paragraphs 5.2.28 to 5.2.31.

F. The Herfindahl-Hirschman Index ("HHI") (paragraphs 3.10 - 3.13)

14. On the one hand, the Draft Guidelines state that the HHI is a screening device for deciding whether the Authority should intensify its analysis of the competitive impact of a merger (paragraph 3.12). However, the Draft Guidelines go on to say that even where a merger falls below the HHI thresholds, it may still raise competition concerns in certain circumstances.

15. The list of "examples" of circumstances where the Authority may disregard a low HHI as indicative that a merger does not raise competition concerns seems to us to be quite extensive. In this case, therefore, we query how useful the HHI is at all other than in

very straightforward cases where it should be evident that competition concerns do not arise and the need to reference HHI is accordingly limited in any event.

G. Mavericks (paragraph 4.31)

16. The Authority did not accept in M/08/011 - *Heineken/Scottish & Newcastle* that the target acted as a maverick. We consider that the new guidelines could include a more detailed discussion of the conditions required to be fulfilled before an undertaking will be considered a maverick.

H. Timeliness of entry (paragraph 5.5)

17. The Draft Guidelines state that the appropriate timeframe for effective new entry will depend on the characteristics and dynamics of the market and the specific capabilities of potential entrants. No guidance is given, however, in this regard. It would be helpful if the Authority could acknowledge, for example, that in most cases, entry within two years will be deemed as timely and that it would be in exceptional circumstances only that the Authority would deviate from this benchmark. This would be more in line with the European Commission's approach in respect of timeliness of entry and would provide more certainty to merging parties.

18. We welcome the statement that the sufficiency requirement may be satisfied by multiple entry and does not need to be satisfied by a single entrant.

I. Buyer Power and SLC (paragraphs 7.4 – 7.5)

19. The Draft Guidelines state that the Authority will examine whether the countervailing buyer power ("**CBP**") of some customers will benefit sufficient customers to prevent an SLC in the market post-merger. The Authority's concern is that the CBP of one or more (but not all) customers may not prevent an SLC where other customers have little or no CBP.

20. It would be helpful if the Authority could give further guidance as to how it will determine whether CBP will benefit *sufficient* customers, in particular, what the Authority will consider in this regard.

J. Evidence for Assessing Countervailing Buyer Power (paragraph 7.10)

21. The Draft Guidelines state that, in assessing CBP, the onus is on the merging parties to provide credible evidence to the Authority to demonstrate the existence of CBP; that CBP will continue post-merger; and that it will be effective. The type of relevant evidence listed in the Draft Guidelines, however, includes data and documentation that would not likely be assessable to the merging parties.

22. It would be helpful if the Authority could clarify if (and in what circumstances) it would be open to using its power to require third parties to provide relevant information where the merging parties could make a credible *prima facie* case that CBP would prevent any potential SLC.

K. Non-Horizontal Mergers (paragraph 8.3)

23. The Draft Guidelines acknowledge that non-horizontal mergers are generally less likely than horizontal mergers to generate competitive concerns and are often pro-competitive (paragraph 8.5), which we welcome.

24. Nevertheless, the Draft Guidelines contain extensive narrative to the circumstances in which vertical mergers could be deemed problematic. We would suggest that it would be appropriate to include a statement that, other than in exceptional circumstances, non-horizontal mergers (and in particular conglomerate mergers) are not likely to raise significant competition concerns leading to an SLC.

25. This would be reflective of the Authority's decisional experience, as, to date, the Authority has not prohibited (or required any significant remedies in respect of) any non-horizontal mergers.

L. Other comments – Illustrative examples

26. The Authority has almost 11 years of experience of applying the merger control provisions of the Act and accordingly has a wealth of decisional practice at its disposal. We would find it very helpful if the Authority could reference more of its own decisions to further illustrate some of the points made in the Draft Guidelines.

27. In particular, some of the issues dealt with in the Draft Guidelines are complicated and having reference to how the Authority applies the theory in practice would be particularly useful, especially to those who may not be familiar with the Irish merger control regime.

M. Other comments – Voluntary notifications

28. We would note that, unlike the Authority's current merger analysis guidelines, the Draft Guidelines do not include a section on voluntary notifications (other than a reference in paragraph 3.14 to HHI being a useful guide where a merger does not meet the statutory thresholds).

29. We consider that it is important that firms and their legal advisers are provided with guidance as to when voluntary notification may be appropriate. We note that a number of voluntary notifications have been made to the Authority, including recently. It would be helpful if the Authority could share the experience it has gleaned in the context of analysis of these voluntary notifications. In particular, we would welcome more detailed guidance on how the Authority approaches these cases than is now provided in section 7 of the current guidelines, including on how/on what basis it identifies mergers that it considers should be notified voluntarily. At the very least, we would urge the Authority to reproduce a version of section 7 of the current guidelines in the new guidelines.

MASON HAYES & CURRAN
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